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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. CORDELL RABON, Defendant and Appellant.	D057175 (Super. Ct. No. FVA900343)

APPEAL from a judgment of the Superior Court of San Bernardino County, Dwight W. Moore, Judge. Affirmed.

INTRODUCTION

A jury convicted Cordell Rabon of first degree murder. (Pen. Code, § 187, subd. (a).) The jury also found true allegations that, in committing the murder, Rabon personally used a firearm (§ 12022.53, subd. (b)), personally and intentionally discharged a firearm (*id.*, subd. (c)), and personally and intentionally discharged a firearm causing the death of the victim (*id.*, subd. (d)). The trial court sentenced Rabon to an aggregate term of 50 years to life in prison.

Rabon appeals, contending the trial court violated his federal and state constitutional rights by overruling his objection to the prosecution's peremptory challenge of an African-American juror. We conclude there is no merit to this contention and affirm the judgment.

BACKGROUND[1]

Prospective Juror No. 11 (Juror 11) was among the initial panel called to the jury box during jury selection. In response to general background questions from the trial court, Juror 11 stated she was single, lived in Rialto, had a 22-year-old son, worked as a human resources coordinator for a public agency, and had no prior jury experience. When asked if she could be impartial, she replied, "I'm not sure. I — being a mother, I don't know. I've never — my son's not in trouble or anything like that, but I think I could be impartial based on my experience in human resources because I have to remain impartial. But I — I would hope I would be able to be impartial on a jury, yes." After the trial court explained, "impartiality really means not making up your mind . . . for any reason other than the evidence and the law," Juror 11 revised her response and said, "Then the answer's yes, I can be impartial."

During defense counsel's opportunity to question the prospective jurors, he discussed with them the difference between a claim and proof. He then generally inquired if there was anything more he should ask of them. Juror 11 responded, "No, no. I'm here to do a job and do it to the best of my ability. I'm a very honest and blunt person

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1 We omit a summary of the facts underlying Rabon's conviction as they are not relevant to the issue raised in this appeal.

and I take all the facts in before I make an informed decision." Defense counsel stated he was looking for jurors who would struggle and win the struggle to be fair, have the guts to stop other jurors who were being unfair, and make sure every juror's view was heard. He asked Juror 11 if she would want herself as a juror and she replied, "Yes, absolutely."

When it was the prosecutor's turn to speak to the prospective jurors, he queried whether they could follow the reasonable doubt standard, or whether they would hold the prosecution to a higher standard and expect the prosecution to prove its case beyond any doubt since this was a murder case. When the prosecutor asked Juror 11 for her specific thoughts on this point, the following exchanged occurred:

> "[Juror 11]: What do I think? I think that it would be nice not to have any reasonable doubt, but in the real world I don't think that's — in a case that's not going to happen. This is a very serious case.
>
> "[Prosecutor]: Well, any — I guess I'm not sure what — how you come down.
>
> "[Juror 11]: You're asking me do I — will I hold you to a higher standard?
>
> "[Prosecutor]: Yes.
>
> "[Juror 11]: Not a higher standard. Just expect for you to do what's expected of you, your job, to present the case.
>
> "[Prosecutor]: Okay.
>
> "[Juror 11]: To give us all the evidence we would need to make the right decision."

In response to a later question from the trial court, Juror 11 reaffirmed she could follow the reasonable doubt standard.

The prosecutor also asked the prospective jurors if the absence of DNA evidence would effect their decision. Juror 11 replied, "I can only evaluate what you presented." She continued, "So there's no DNA, I wouldn't miss it."

After asking another prospective juror a similar question about the absence of fingerprint evidence, the prosecutor returned to Juror 11 and asked, "Okay. [Juror 11], I noticed a reaction to my [fingerprint evidence] question." She responded, "No. I'm just wondering what you have. I'm sorry. I'm sorry." The prosecutor said, "Well, there's other types of evidence." She replied, "I know it is. That's just the reaction. You asked me what was going through my mind. What do you have? That's what was in my mind."

The prosecutor then asked the prospective jurors if they thought crime scene investigation television shows were realistic. Juror 11 appeared to interrupt another prospective juror's response and said, "I think the case where they start off in the first 30 seconds what happened is reality. After that, no."

Further in the selection process, the prosecutor and Juror 11 had the following exchange:

> "[Prosecutor]: I think at one point [defense counsel] asked if people think by and large police get the right person. Remember that question? I think some said yes. I don't know how much comment there was. I made a note, [Juror 11], that you reacted to that.
>
> "[Juror 11]: I did?
>
> "[Prosecutor]: You did. I made a note of it.
>
> "[Juror 11]: I saw you.
>
> "[Prosecutor]: And how come you reacted that way?

"[Juror 11]: About the police always being right?

"[Prosecutor]: Yes.

"[Juror 11]: Because I don't believe that they're always right.

"[Prosecutor]: I think he actually asked were the police more often than not or for the most part get the right person.

"[Juror 11]: I don't remember that, but —

"[Prosecutor]: Okay.

"[Juror 11]: — I would hope that they would. But I'm not a hundred percent on the side that, yes, they get the right person all the time, no.

"[Prosecutor]: Okay. And thank you for your honesty.

"[Juror 11]: You're welcome.

"[Prosecutor]: I was right, though? You did react though; right?

"[Juror 11]: I probably did. Knowing me, yes."

The prosecution used its fourth peremptory challenge to excuse Juror 11. The trial court noted Juror 11 "reacted emotionally to the excusal and I believe I heard her say the words, 'Thank God,' as she departed the jury box." The prosecutor also heard this remark.

Defense counsel objected to the preemptory challenge of Juror 11 under *Batson v. Kentucky* (1986) 476 U.S. 79 (*Batson*) and *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*), overruled in part by *Johnson v. California* (2005) 545 U.S 162, 165, 173, arguing the strike was racially motivated. As support for the objection, defense counsel asserted that Juror 11 was one of two African-American jurors on the panel, and there were only two or three others in the entire venire. The trial court rejected the

Wheeler/Batson claim, finding Juror 11 was the first African-American juror excused with a peremptory challenge[2] and defense had not made a prima facie showing the strike was racially biased.

The prosecutor subsequently explained for the record that he excused Juror 11 because she had a son the same age as Rabon, she was equivocal in her response to the question about whether she could remain impartial, and he was concerned by her reaction to learning there was no DNA or fingerprint evidence. In addition, he was concerned about her ability to work with other jurors because of her admitted bluntness. He also saw her put her head in her hands many times and make faces at other jurors' responses to questions. Consequently, her demeanor appeared to him to be generally disrespectful. He further noted he had not used his prior three peremptory challenges on African-Americans and there were two other African-Americans in the jury box who had not been excused.[3]

Defense counsel disputed the prosecutor's concerns about Juror 11's facial expressions and demeanor. The trial court stated it did not necessarily share the prosecutor's interpretations of every expression; however, it observed Juror 11 was very expressive and animated and did react to questions asked of others.

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2 The parties stipulated to excusing another African-American juror because he was scheduled to have oral surgery.

3 It appears from the record these two people ultimately became jurors.

DISCUSSION

"The governing principles are well settled. 'Under *Wheeler* . . . , "[a] prosecutor's use of peremptory challenges to strike prospective jurors on the basis of group bias — that is, bias against 'members of an identifiable group distinguished on racial, religious, ethnic, or similar grounds' — violates the right of a criminal defendant to trial by a jury drawn from a representative cross-section of the community under article I, section 16 of the state Constitution. [Citation.]" [Citation.] "Such a practice also violates the defendant's right to equal protection under the Fourteenth Amendment." ' " (*People v. Taylor* (2010) 48 Cal.4th 574, 611 (*Taylor*).)

"The three-step inquiry governing *Wheeler/Batson* claims is well established. 'First, the trial court must determine whether the defendant has made a prima facie showing that the prosecutor exercised a peremptory challenge based on race. Second, if the showing is made, the burden shifts to the prosecutor to demonstrate that the challenges were exercised for a race-neutral reason. Third, the court determines whether the defendant has proven purposeful discrimination. The ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike.' " (*People v. Lomax* (2010) 49 Cal.4th 530, 569.)

A defendant establishes a prima facie case " 'by producing evidence sufficient to permit the trial court to draw an inference that discrimination has occurred.' " (*Taylor*, *supra*, 48 Cal.4th at p. 614.) Evidence potentially relevant to this inquiry includes: (1) whether the prosecutor used peremptory challenges against all or most of the members of the identified group from the venire, or used a disproportionate number of peremptory

challenges against the group; (2) whether the prosecutor failed to ask the excused jurors any questions or only halfheartedly engaged them during voir dire; and (3) whether the defendant and/or the victim are members of the identified group. (*Id.* at p. 615; *People v. Bell* (2007) 40 Cal.4th 582, 597.) If the trial court rejects a defendant's *Wheeler/Batson* claim because the defendant did not establish a prima facie case, we "undertake an independent review of the record to decide 'the legal question whether the record supports an inference that the prosecutor excused a juror on the basis of race.' " (*Taylor*, *supra*, 48 Cal.4th at p. 614.)

Here, other than the fact both the defendant and the victim were African-American, the record is devoid of any evidence supporting an inference of discrimination. Nothing in the record suggests the prosecutor exercised peremptory challenges on all or most of the prospective African-American jurors, or used a disproportionate number of peremptory challenges against this group. Instead, the record indicates the prosecutor had not used any of his three peremptory challenges against African-Americans, and when he excused Juror 11, there were two other African-Americans in the jury box, both of whom apparently became jurors. There were also at least a few more African-Americans in the venire.

Moreover, the prosecutor thoroughly engaged Juror 11 in voir dire. He asked her meaningful questions about her thoughts on the application of the reasonable doubt standard in a murder case, whether DNA or fingerprint evidence is necessary to prove a criminal case, and the reliability of police. He also asked her about her visible reactions

to other jurors' responses, which he later explained was an area of particular concern for him because jurors must be able to work together.

Furthermore, the California Supreme Court has repeatedly recognized that a peremptory challenge to a single prospective juror who is a member of an identifiable group is not sufficient by itself to support an inference the challenge was based on the juror's group membership. This is especially true where, as here, other prospective jurors who are members of the same group remain in the jury box and are ultimately seated on the jury. (*Taylor, supra*, 48 Cal.4th at pp. 614-615; see also *People v. Hamilton* (2009) 45 Cal.4th 863, 898 [challenge to one African-American juror is not sufficient to suggest a pattern of discriminatory challenges and make a showing of racial bias]; *People v. Bell, supra*, 40 Cal.4th at p. 598 [although the exclusion of a single prospective juror may be the product of group bias, as a practical matter, the challenge of one or two jurors can rarely suggest a pattern of impermissible exclusion]; *People v. Cornwell* (2005) 37 Cal.4th 50, 69-70, disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22 [challenge to one of two prospective African-American jurors does not support an inference of bias where the prosecutor repeatedly passed on the other juror and the other juror ultimately served on the jury].)

Finally, the record discloses race-neutral reasons for the prosecutor's peremptory challenge of Juror 11. She had a son near Rabon's age, which she initially suggested might prevent her from being impartial. While she later indicated she could, in fact, be impartial, the prosecutor could have reasonably had lingering concerns, especially given her reaction to learning there would be no DNA or fingerprint evidence presented.

The prosecutor also could have reasonably had concerns about her ability to work with the other jurors. She admitted to being blunt and to visibly reacting to other juror's responses. In addition, it appears at one point during voir dire she may have even interrupted another juror's response to express her own opinion on a topic. Although the trial court stated it did not necessarily endorse the prosecutor's interpretation of Juror 11's demeanor, the trial court acknowledged she was expressive and had reacted to other jurors' remarks. Her parting comment after the prosecutor excused her, likewise, supports the prosecutor's concerns. Accordingly, we conclude the trial court correctly determined Rabon had failed to make a prima facie showing the prosecutor's preemptory challenge of Juror 11 was racially motivated.

DISPOSITION

The judgment is affirmed.

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MCCONNELL, P. J.

WE CONCUR:

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NARES, J.

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HALLER, J.